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No. 01-127

In The

Supreme Court of the United States

OKSANA OLESZKO,

Petitioner,

v.

STATE COMPENSATION INSURANCE FUND, DAVID HOWARD, AND DORA COOKE,

Respondents.

On Petition For Writ Of Ceritorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER G. LOMHOFF
Counsel of Record
Attorney at Law
One Kaiser Plaza, Suite 1725
Oakland, California 94612
(510) 763-5611
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION TO REPLY

Respondents have unfortunately severely misstated both the procedural posture of the case and the facts in the record. These misstatements must be corrected.

PROCEDURAL POSTURE

Respondents argue that the case was lost on its own facts, and could not possibly be revived even if the discovery sought from the respondents' Employee Assistance Program ("EAP") were allowed.

In fact the Court of Appeals assumed a prima facie case, but then found that petitioner Oleszko had shown no evidence that the respondents' stated reasons for their actions were a pretext. Petition, Appendix, 14-15. Evidence of other similar violations would permit a jury to find pretext. As the court stated in *Bennun v. Rutgers State University*, 941 F.2d 154 (2d Cir. 1991) at 179, a fact finder may "assess credibility in the light of the maxim, falsus in uno, falsus in omnibus . . . 'false in one thing, false in everything.' " Therefore, if EAP discovery is permitted, summary judgment will have to be reversed, and the case will be remanded for further discovery and trial.

A similar scenario occurred in *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997). The district court assumed a prima facie case but granted summary judgment because it found no evidence of pretext. The Eighth Circuit reversed, holding that the lower court had improperly denied certain discovery based on a non-existent ombudsman privilege, analogous to the EAP

privilege announced by the Ninth Circuit here. 114 F.3d at 792, 795.

FACTS

The respondent's statement of facts is an unfortunate extreme, highly prejudicial and misleading misstatement of the record. It must be corrected.

A. Facts of Oleszko's Discrimination and Retaliation Claims

Shortly after petitioner Oksana Oleszko started working as a computer programmer in the Data Processing Department at State Compensation Insurance Fund ("SCIF") in 1989, she suffered treatment which a company Affirmative Action Officer later identified as sexual harassment. Oleszko tried to just live with the situation and let the harassment subside.[1]

Several years later, on April 27, 1993, a SCIF Affirmative Action Officer received a report from another Data Processing employee about a romantic relationship between the department section head, respondent David Howard and another of Oleszko's supervisors, respondent Dora Cooke. Their relationship violated company anti-nepotism rules. The employee reported that the Howard-Cooke relationship caused harassment of others

[1] This summary is based on the facts as set forth in the declarations at Excerpts of Record ("ER"), #112, 1-28 and #113, 1-17.

in the department, including petitioner Oleszko, when Howard jealously protected his much younger girlfriend, Cooke. The Affirmative Action Officer identified the situation as sexual harassment and urged Oleszko to tell her about it. Oleszko cooperated with her investigation, but very reluctantly, because Oleszko knew retaliation against her would surely follow.

That is exactly what happened. Retaliation in a variety of forms started a few days later, including unfair public criticism, sabotage of Oleszko's work in a variety of ways including denial of necessary training, removal of job assignments, retaliatory job assignments, preventing completion of work by denying of necessary information and denial of other resources, denying credit and recognition for work done, and denial of a promotion while almost everyone in the department was promoted past her, until Oleszko was finally promoted on July 1, 1996, the day after respondent Howard retired.

When Oleszko was finally promoted, it was from the same civil service eligibility list, from another state agency, that she had been on all along. In fact her rank on that list was the top position, higher than the ranking of most others promoted past her, but she was not promoted until the moment her vindictive supervisor, defendant Howard, retired. The record shows that she had followed correct procedure for obtaining that promotion all along. That correct procedure finally worked as soon as respondent Howard was gone.

An important factor in this treatment of Oleszko is that her department has a very strong bias in favor of persons of Asian descent, causing discrimination against

non-Asians such as Oleszko who is Caucasian. The uncontradicted statistical evidence shows that the odds of the favoritism of Asians in the work force in Oleszko's department at SCIF occurring randomly, without using race as a selection criterion which respondents deny, are *less than one in one hundred billion*. ER #111, 3:18-4:1.

B. Facts Concerning the SCIF Employee Assistance Program

As respondents acknowledge, the SCIF Employee Assistance Program deals with a wide variety of problems including legal and financial issues, not just issues involving psychotherapy. As the Petition for Certiorari shows, these issues include employment discrimination.

The claimed confidentiality of SCIF EAP communications is actually quite limited.

The SCIF EAP's claims of confidentiality are based on a "Memorandum of Understanding" (Supplemental ER #78).

The Memorandum states at Section 9.4(b), "Employees who are to be referred . . . to an Employee Assistance Program Coordinator will be referred by the appropriate management personnel." There is nothing confidential about a program when the employees' supervisor sends them there.

Section 9.4(c) of the Memorandum specifically provides for a variety of management personnel to know about EAP referrals. It says "No manager, supervisor, department director or coordinator shall disclose the nature of the employee's treatment or the reason for the

employee's leave of absence." This provision assumes that those managers will know "the nature of the employee's treatment" pursuant to an EAP referral. That is not confidential treatment.

Under Section 9.4(b) leaves of absence without pay for treatment "may be granted by the department head or designee upon the recommendation of the Employee Assistance Program Coordinator. . . . " When EAP refers an employee to outside treatment the payroll department and the employee's own supervisor can know about it. That is not confidential.

Section 9.4(c) provides that "records concerning an employee's referral and/or treatment shall be kept confidential." That is not even close to the all inclusive absolute confidentiality respondents claim. It excludes from confidentiality, for example, the very employment discrimination information that Oleszko seeks in this case.

RESPONSE TO "REASONS FOR DENYING THE WRIT"

Respondents' reasons for opposing the writ simply ignore fundamental policies that have guided the law of privilege in the federal courts for decades.

A. Confidentiality in Business and Professional Relationships Does Not Require an Evidentiary Privilege in Federal Court

The respondents argue that EAP's are a good thing, and that an assurance of confidentiality to EAP clients

facilitates the useful work of the EAP. That is not disputed. Privacy and confidentiality are undoubtedly useful and beneficial in a vast variety of communications in business and in the professions.

It is a logical error to jump from recognizing the utility of confidentiality as a general matter to concluding that confidential communications are privileged. As the Eighth Circuit explained in *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794 (8th Cir. 1997), it is entirely possible, indeed routine and normal, to meaningfully and effectively assure confidentiality, even though there is a possibility that disclosure of the communication may be required in some future unrelated lawsuit. *Carman* held that a company ombudsman, like the SCIF EAP, can maintain confidentiality with its employee clients without the need to create a privilege to protect such communications.

B. The Nature of EAP Communications Are Fundamentally Different from Heretofore Privileged Communications

Professional relationships where privileges have been recognized in the past deal with limited narrow ranges of professional consultations. Doctors, psychotherapists, attorneys and priests deal with a limited range of subject matter which courts have sought to protect from public disclosure even at the cost of thwarting discovery of truth in legal proceedings.

EAP communications are not limited to a particular narrowly defined area of professional consultation. As respondents acknowledge an EAP counselor can deal

with everything from workplace disputes to severe emotional problems. Communications with doctors are not privileged when the communication concerns an employment dispute unrelated to medical care. What the Ninth Circuit has announced here is just such a vast ill-defined absolute privilege. When EAP counselors act as assistants to psychotherapists in the course of psychotherapy, then it is reasonable to protect those communications, but the Ninth Circuit has established a privilege far more absolute, for all EAP communications, than even the attorney-client privilege. This new privilege is too vast and ill defined to justify the unlimited suppression of the truth it will necessarily require.

C. Professional Communication Privileges in the Federal Courts Are Rare

There are a few situations in which the circumstances are so unusual that it is necessary to suppress relevant evidence. These include lawyer-client communications (though even that fundamental privilege is not absolute, see, e.g., the crime-fraud exception of *United States v. Zolin*, 491 U.S. 554, 563 (1989)), psychotherapy, *Jaffee v. Redmond*, 518 U.S. 1 (1996), the privilege against self-incrimination, and state secrets, *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958).

Various other possible privileges, far more compelling than an EAP privilege, have not been recognized by the federal courts, including for example physician-patient. *Gilbreath v. Guadalupe Hosp. Found., Inc.*, 5 F.3d 785, 791 (5th Cir. 1993). Others rejected by this court

include privileges for accountants, for academic peer review, and for debate by state legislators. *Jaffee*, supra, dissent, 518 U.S. at 19.

D. The "Ombudsman Privilege" Rejected in *Carman v. McDonnell Douglas* Is Closer to the Recognized Privileges than the New EAP Privilege

As respondents point out, the professional function of the ombudsman in *Carman v. McDonnell Douglas*, 114 F.3d 790 (8th Cir. 1997) is much more narrow than what an EAP counselor does. The *Carman* ombudsman's job more closely resembles what a lawyer does, that is receive information about disputes and attempt to resolve them. Although the range of the issues dealt with is limited to a category of legal disputes that might otherwise by handled by an attorney, the Eighth Circuit held that the confidentiality promised by the *Carman* ombudsman could be protected without expanding it into an evidentiary privilege. 114 F.3d at 793-794.

Unlike the narrow, lawyer-like function of the *Carman* ombudsman, the SCIF EAP counselors deal with an unlimited and vast variety of problems, so the policies weighing against a privilege, especially when the EAP is not providing psychotherapy, are far more compelling than in the case of the *Carman* ombudsman.

CONCLUSION

In order to justify a new evidentiary privilege the court must find that "permitting a refusal to testify or

excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). Creating a new evidentiary privilege for communications with an EAP counselor, particularly communications concerning employment discrimination and not concerning psychotherapy, fails that test.

Respectfully submitted,

PETER G. LOMHOFF
Attorney for Petitioner

Dated: September 10, 2001